In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 261

STEVEN L. RUSKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 640-641; Pet. App. 1a-2a) is reported at 358 F.2d 737.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1966 (R. 642). A petition for rehearing was denied on May 20, 1966 (R. 643-654). The petition for a writ of certiorari was filed on June 20,

1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court, sitting without a jury, could properly find petitioner guilty on a conspiracy count and not guilty on substantive counts.

STATEMENT

Petitioner and others were charged in the United States District Court for the District of Florida in a 15-count indictment. The first seven counts charged fraudulent sales of securities in violation of 15 U.S.C. 77q(a); the next seven, mail fraud in violation of 18 U.S.C. 1341; and count 15 a conspiracy to violate the statutes cited in the substantive counts (R. 561-579). The general nature of the scheme was that the defendants would make fraudulent representations to investors in the sale of notes of the Commercial Capital Corporation ("Commercial") and the Industrial Finance Corporation ("Industrial") by stating that these corporations were operating at a profit and could pay interest as high as 15%; by lulling investors into a sense of security by making some interest payments; by stating that the notes were secured by other collateral paper in excess of the amount of the notes; and by stating that they had obtained insurance against the corporations' losses (R. 562-566). In a trial to the court (a jury having been waived), petitioner was found guilty only on Count 15, the conspiracy count; he was sentenced to

probation for three years and a $500 fine (R. 554, 557-558).[1] On appeal (R. 621) the conviction was affirmed (R. 642).

The evidence showed that in the spring of 1959 one Sills told petitioner, a Miami attorney, that he wished to activate a dormant financial corporation, so that he could advertise it as having been in existence for some time (R. 147-149). Petitioner knew that Sills had been convicted on a Florida charge of grand larceny (R. 146-147), and of giving a false financial statement to the Securities and Exchange Commission (R. 213). Sills, who had received publicity as a result of his grand larceny conviction, felt that his real name would have an adverse effect on prospective investors and changed it to R. S. Roberts. Petitioner prepared various legal papers for Sills, using the name Roberts (R. 150-151). On April 24, 1959, the A-Gee Construction Co., Inc., which petitioner had formed in 1953, changed its name to Commercial Capital Corporation, with petitioner signing the amendment certificate as president of A-Gee (R. 161-162). Sills, using the name Roberts, sent a letter to investors dated April 27, 1959 (Gov. Ex. 13) after having discussed its contents with petitioner. This letter read in part (R. 160):

> Commercial Capital Corp. has been incorporated since 1953, and enjoys a well-earned reputation in the financial world for capable and astute management.

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[1] Codefendant McKee was found guilty on the conspiracy count and guilty on all of the substantive counts with the exception of Counts 6, 10, 12 and 13 (R. 554).

At the time petitioner knew that Sills had no money. As a result of this letter approximately $20,000 was received at petitioner's office (R. 162-164).

Sills was primarily a salesman and did not know how to acquire "car paper" at a discount (R. 165, 167). Petitioner and Sills decided that codefendant McKee, whom they had known at Federal Finance, would be a good finance man for the corporation (R. 165). McKee accepted Sills' offer of a 25% interest in Commercial plus a working wage as an officer (R. 166). Sills testified that investors were to be told that if they loaned $1,000, they would receive a promissory note from Commercial and their investment would be secured by a collateral assignment consisting of "car paper" in the amount of 25% over the face value of the notes (R. 166-167).

Petitioner and Sills discussed possible purchase from Gottlieb and Chariton of car paper, much of which was uncollectible and could be purchased at a low price (R. 169-172). Petitioner was aware that this paper was to be used as collateral for investors' loans (R. 172-173). Gottlieb testified that, after negotiations with petitioner, Gottlieb's company on August 18, 1960 (after it had lost its license) sold paper to Commercial with a face value of $107,000 for a price of $21,468 (R. 414-417, 431). Chariton testified that his General Loan Company sold bulk discount paper to Commercial with a face value of between $20,000 and $30,000 for $5,000 (R. 436-437). For this Chariton was paid by check in the amount of

$25,000 payable to General Loan Company (R. 440-441). Out of this $25,000 check, $5,000 was deposited in a General Loan Company account and a check for $20,000 was delivered to Sills (R. 442-443). Petitioner and McKee approved for Industrial and Commercial letters to the investing public and newspaper advertisements (R. 333, 336, 379, 390-391). For legal services petitioner received $13,062.39 from Commercial and $6,650 from Industrial (R. 505).

A typical investor lost most of his investment. For example, one Commercial investor received only $750 as a return of principal through the bankruptcy court and $2100 in interest, on a total investment of $15,000 (R. 47).. Financial statements showed a loss of $134,743.73 for Industrial as of September 30, 1960, and a loss of $233,600 for Commercial as of April 30, 1961 (R. 493, 494).

ARGUMENT

The evidence set forth in the Statement amply supports the conclusion of the trial judge that petitioner was part of the conspiracy to defraud. Petitioner argues that, nevertheless, the conviction should be reversed because the judge did not also find him guilty of the substantive counts based on mailings to particular defrauded investors with whom petitioner did not personally deal. It may well be that, under the doctrine of *Pinkerton* v. *United States*, 328 U.S. 640, petitioner could properly have been found guilty of the substantive offenses in furtherance of the conspiracy even though he did not directly participate

therein. The fact that the judge failed to apply that principle to petitioner gives him no ground to complain of a verdict which the evidence clearly supports. There is no *factual* inconsistency in the judge's verdict, such as was present in *United States* v. *Maybury*, 274 F.2d 899 (C.A. 2) upon which petitioner relies; there is at most an error of law in petitioner's favor in that the court did not apply the conspiracy principle to the full extent possible.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

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